

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 15, 2009 Session

IN RE A.M.B.

**Appeal from the Juvenile Court for Sumner County
No. 2008-JV834 Barry Brown, Judge**

No. M2008-02432-COA-R3-JV - Filed May 20, 2009

Former girlfriend of father and girlfriend's mother ("Petitioners") brought action seeking custody of father's child who lived with Petitioners for approximately five years. At a hearing to determine custody of the child, prior to the conclusion of Petitioner's case in chief, the juvenile court denied the custody petition; Petitioners appeal. Finding error, we reverse and remand.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Reversed and
Remanded**

RICHARD H. DINKINS, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S. and FRANK G. CLEMENT, JR., J. joined.

Gary M. Williams, Hendersonville, Tennessee, for the appellants, Laveta Suzette Graham and Candice C. Graham.

Renard A. Hirsch, Sr., Nashville, Tennessee, for the appellee, Mitchell Ballard.

OPINION

I. Factual and Procedural Background

The Appellee, Mitchell Ballard, is the biological father and legal custodian¹ of A.M.B. Candice Graham, one of the Petitioners, began dating Mr. Ballard in 2003. In early 2004, when A.M.B. was about 6 months old, Mr. Ballard moved with A.M.B. into the home of Candice Graham's mother, Laveta Suzette Graham ("Suzette Graham"), the other Petitioner, with whom Candice also lived. During the time A.M.B. lived with the Grahams, Mr. Ballard listed Candice and

¹ Mr. Ballard was awarded legal custody of A.M.B. by order of the Davidson County Juvenile Court on July 12, 2005. The order awarded "both physical and legal custody of the child" to Mr. Ballard until A.M.B. reaches the age of eighteen. A.M.B.'s biological mother waived her visitation rights, though Mr. Ballard was permitted to allow the mother to visit A.M.B., "at his own discretion and desire," and the mother was not required to pay child support.

Suzette Graham as A.M.B.'s mother and grandmother, respectively, on school and medical forms. In January 2007, Mr. Ballard moved out of the Grahams' home, but left A.M.B. to live there, where she remained until July 27, 2008. After moving out, Mr. Ballard visited with A.M.B. occasionally, but did not provide support for her care beyond the purchase of a pair of softball cleats.

On July 27, 2008, Mr. Ballard made arrangements with the Grahams to visit with A.M.B.; rather than returning A.M.B. to the Grahams, however, Mr. Ballard took her to live with him in North Carolina. On August 4, 2008, the Grahams filed a third party petition in Sumner County Juvenile Court seeking custody of A.M.B. The Petition alleged that since moving from the Grahams' home Mr. Ballard had only visited A.M.B. ten to twelve times and that the Grahams had "continuously cared and provided for the minor child, emotionally and financially, since the minor child came into their home." The Petition asserted that Candice and Suzette Graham "are fit and proper persons to have custody of the minor child, [A.M.B.], and are fully capable of taking care of this minor child and this [is] in the minor child's best interest." The Petition further asserted that "the minor child has lived with the Petitioners . . . for approximately four and one-half years (4 ½) years and the child has a close emotional and physical bond with the Petitioners and that substantial harm is, and will continue to, effect the minor child, [A.M.B.], if she is kept away from the only caretakers she knows." Mr. Ballard filed an Answer admitting that he and Candice Graham had been romantically involved and that he and A.M.B. had lived with the Grahams for approximately two years. Mr. Ballard denied the remaining allegations of the petition.

A hearing on the petition was held on September 19, 2008. The court heard testimony from Zachary Goode, an acquaintance of the parties who was incarcerated at the time of trial, Detective Don Linzy, Chief Detective and network administrator at the Sumner County Sheriff's Office, Candice Graham, and Suzette Graham. Following Suzette Graham's testimony and before the Grahams closed their case in chief, the court asked the Grahams' counsel what other witnesses the Grahams intended to call and the expected content of their testimony. Counsel informed the court that they intended to call A.M.B.'s nanny, Valerie Thompson, who was expected to testify that Mr. Ballard was not very involved in the care of A.M.B. and that Mr. Ballard has and shows a temper around A.M.B. The court responded, "[t]here's no doubt in my mind [about that]." Counsel also informed the court that they intended to call several other witnesses who were friends of the Grahams. The court then stated "Ladies and gentlemen, like I said, I'm right back where we started from. Let's use some common sense here. I haven't heard from you [Mr. Ballard] yet. Mr. Hirsch, I'm going to talk to your client a little bit first." After asking Mr. Ballard whether it was true that the Grahams took care of A.M.B., the court proceeded to make its determination of the case:

There's no doubt in my mind that what y'all have told me is true. She's your – in your heart and in your soul this child is yours; morally, but not legally. And there is a difference. This court does not rule by heart or everything. . . . But there has been no proof to me that you're a bad father. Yeah, the child was there. You may have sold drugs. There's no proof that you ever did it in front of the child. Lots of other stuff.

I think you're entitled to your child, and I'm going to allow you custody. But at the same time let me talk to you a little bit else here. You would be one sorry human being to take that child away from these people forever. . . . I'm going to deny their motion for custody. I have to. However, I am going to set up certain visitation periods for a short time period because this child has to have an adjustment to know you and Page[.] . . . I think if you are doing drugs, it's going to come back. You mess around this Page girl like you may have messed around with this lady, it's going to come back. I know that. To be honest with you, I don't really like my own decision here, but I know what the law tells me to do. It's very simple. . . .

The Order memorializing the court's judgment made no findings of fact, but simply denied the Grahams' custody petition. The court did, however, grant visitation and telephone privileges to the Grahams that would expire in June 2009.

The Grahams appeal, asserting that the juvenile court erred in not finding Mr. Ballard "was unfit and/or there was not danger of substantial harm to the minor child and not awarding custody to [the Grahams]." The Grahams assert, in the alternative, that if this Court uphold's the juvenile court's order, visitation should be extended. Mr. Ballard contends that the Grahams did not present clear and convincing evidence of substantial harm to A.M.B. if she remains in his custody. Mr. Ballard also contends that the Grahams' current visitation and telephone privileges should be allowed to lapse as scheduled in June 2009.

II. Analysis

A biological parent has a constitutionally protected liberty interest in raising his or her child, including the care, custody, and control of the child, free from unwarranted state intervention. *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 2060, 147 L.Ed.2d 49 (2000); *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 1394, 71 L.Ed.2d 599 (1982); *Hawk v. Hawk*, 855 S.W.2d 573, 579 (Tenn. 1993); *In re Swanson*, 2 S.W.3d 180, 186 (Tenn. 1999); *Ray v. Ray*, 83 S.W.3d 726, 731 (Tenn. Ct. App. 2001). Accordingly, a biological parent's custody claims carry more weight than those of a third party. *Ray*, 83 S.W.3d at 732. A biological parent's right is not absolute, however; it "continues without interruption only as long as a parent has not relinquished it, abandoned it, or engaged in conduct requiring its limitation or termination." *Blair v. Badenhope*, 77 S.W.3d 137, 141 (Tenn. 2002). Where a third party can demonstrate by clear and convincing evidence that the child will be exposed to substantial harm if custody is awarded to the biological parent, the courts may award custody to a third party. *Ray*, 83 S.W.3d at 732.

While the courts have not defined all of the circumstances that pose a risk of substantial harm to a child "because of the variability of human conduct,"² the harm must be "real hazard or danger

² The Tennessee General Assembly has identified some of the circumstances that might cause substantial harm to a child including the various grounds for terminating parental rights in Tenn. Code Ann. § 36-1-113(g), the examples
(continued...)

that is not minor, trivial or insignificant,” and it “must be more than a theoretical possibility.” *Ray*, 83 S.W.3d at 732. Courts have observed that “a finding of substantial harm to a child includes ‘a finding of parental unfitness.’” *Id.* at n. 6 (citing *Eason v. Bruce*, No. W2000-01326-COA-R3-CV, 2001 WL 502834, at *2 (Tenn. Ct. App. May 10, 2001) (No Tenn. R. App. P. 11 application filed)); *see also In re Askew*, 993 S.W.3d 1, 4 (Tenn. 1999). The third party seeking custody bears the burden of proving that the biological parent poses a substantial risk of harm to the minor child by clear and convincing evidence. *Ray*, 83 S.W.3d at 733 (citing *Stubenfield v. State ex rel. Fjelstad*, 171 Tenn. 580, 587, 106 S.W.2d 558, 560 (1937); *see also In re C.W.W.*, 37 S.W.3d 467, 473 (Tenn. Ct. App. 2000); *Moore v. Moore*, No.03A01-9708-CH-00382, 1998 WL 758995, at *3 (Tenn. Ct. App. Oct. 30, 1998) (No Tenn. R. App. P. 11 application filed); *O’Daniel v. Messier*, 905 S.W.2d 182, 187 (Tenn. Ct. App. 1995).

In a non-jury case such as this one, we ordinarily review the record *de novo* with a presumption of correctness as to the trial court’s specific findings of the fact, and we must honor those findings unless the evidence preponderates to the contrary. Tenn. R. App. P. 13(d); *Union Carbide v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993). In the present case, however, the trial court made no findings of fact, written or otherwise, which leaves nothing to which the presumption of correctness can attach. In such a situation, our review is *de novo* without a presumption of correctness. *See In re D.R.B.*, No. 01A01-9802-JV-00105, 1999 WL 617612, at *2 (Tenn. Ct. App. Aug. 17, 1999) (citing *Goodman v. Memphis Park Comm’n*, 851 S.W.2d 165, 166 (Tenn. Ct. App. 1992); *Kelly v. Kelly*, 679 S.W.2d 458, 460 (Tenn. Ct. App. 1984)).

Generally, trial judges have broad discretion over the admissibility of evidence, the order of the proof, and the scope and extent of examination, *see Castelli v. Lien*, 910 S.W.2d 420, 425-26 (Tenn. Ct. App. 1995); however, they also have a duty to hold a full hearing. “The most basic principle underpinning procedural due process is that individuals be given an opportunity to have their legal claims heard at a meaningful time and in a meaningful manner.” *Lynch v. City of Jellico*, 205 S.W.3d 384, 391 (Tenn. 2006) (citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-30, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982); *Manning v. City of Lebanon*, 124 S.W.3d 562, 566 (Tenn. Ct. App. 2003)). We find that the trial court erred in ruling prior to the close of all proof; the court should have permitted the Grahams to conclude the presentation of their evidence, afforded Mr. Ballard the opportunity to introduce proof and proceeded with the court’s expressed intention to hear from Mr. Ballard prior to ruling.³

²(...continued)

found in the parental relocation statute, *see* Tenn. Code Ann. § 36-6-108(d) and the grandparent visitation statute, *see* Tenn. Code Ann. § 36-6-306(b)(1), and the statutory definition of a dependent and neglected child in Tenn. Code Ann. § 37-1-102(b)(12). While these statutes are not intended to be the exclusive source for circumstances causing substantial harm to children, they provide helpful guidance. *See Ray*, 83 S.W.3d at 732.

³ Even if the parties had not called Mr. Ballard to testify, in light of the proof that is in this record, particularly Mr. Ballard’s drug use and violent temper, as well as the related consideration of the best interests of A.M.B., it would have been appropriate for the court to call Mr. Ballard to testify.

In making its ruling, the trial court applied the preference given to biological parents in awarding custody of a child. At the time the court made its ruling, however, the Grahams had not closed their proof and the court had not yet heard from Mr. Ballard; the proof introduced to that point related primarily to Mr. Ballard's conduct over the previous five years. While such evidence is relevant "to the extent that it assists in determining a person's current parenting skills or in predicting whether a person will be capable of having custody of a child," *Ray*, 83 S.W.3d at 734 (citing *Gaskill*, 936 S.W.2d at 630), custody decisions "should focus on the parties' present and anticipated circumstances and on the parties' current fitness to be custodians of children." *Id.* The record at the time the court made its ruling did not contain any evidence about Mr. Ballard's current or anticipated circumstances beyond the fact that he was living in North Carolina with a woman who was pregnant with his child and where he had family. The court's statement at the time of ruling that "there has been no proof to me that you're a bad father," failed to address the critical question presented to the court – whether A.M.B. was at risk of substantial harm in the custody of Mr. Ballard. Given Mr. Ballard's history of leaving A.M.B. with the Grahams and referring to Candice and Suzette Graham as A.M.B.'s mother and grandmother, respectively, the testimony of his sales of drugs, his violent temper around A.M.B. and the refusal of a friend of his to testify at the hearing,⁴ together with the lack of testimony regarding his current circumstances, the court could not assess whether the preference given biological parents in custody matters should prevail.

III. Conclusion

For the above reasons, we reverse action of the Sumner County Juvenile Court dismissing the petition for custody and remand the case for a full hearing thereon. Pending the hearing, the trial court's order granting visitation and telephone privileges to the Grahams should continue.

Costs are taxed to Mitchell Ballard, for which execution may issue if necessary.

RICHARD H. DINKINS, JUDGE

⁴ The Grahams called Mr. Goode, an acquaintance of the parties who was incarcerated in the Sumner County Jail at the time of the hearing to inform the court about Mr. Ballard's dangerous lifestyle including selling drugs; however, Mr. Goode refused to testify. Following Mr. Goode's refusal to testify, the Grahams sought to introduce a recording of a telephone conversation between Mr. Goode and Suzette Graham while he was incarcerated at the Sumner County Jail through Detective Don Linzy of the Sumner County Sheriff's Office. Prior to the tape being played, Mr. Ballard's counsel made a general objection to the "relevancy" of the tape and requested that "the testimony be limited to any activity that Mr. Ballard was engaged in at this time." The court sustained the objection but allowed the tape to be played; we assume that the court allowed the evidence on the tape to be received subject to being stricken on the basis of relevancy. On the tape, Mr. Goode was heard telling Suzette Graham that he was afraid to testify against Mr. Ballard because he was worried that Mr. Ballard would "want to come kill me." Mr. Ballard's counsel objected to the statement on the ground that it was speculation; the trial court sustained the objection. Inasmuch as Mr. Goode's statement was not offered for the truth of the matter asserted, but merely intended to show why he refused to testify, we do not find the statement to be speculative.